

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

LAYSON'S RESTORATIONS, INC.,

Plaintiff/Appellant,

v.

JOHN A. STERBICK; THE LAW
OFFICES OF JOHN A. STERBICK, P.S.,

Defendants/Appellees.

CASE NO. 3:16-cv-05034-RJB

ORDER AFFIRMING ORDER
GRANTING SUMMARY
JUDGMENT

This matter comes before the Court on Layson's Restorations, Inc. (Layson's) appeal of a bankruptcy court order summarily dismissing Layson's complaint in an adversary action. Dkt. 8-2 and Bank. Adversary Proc. 15-04158-PBS, Dkt. 19. The Court has considered Layson's appeal, the briefing filed in response, and the remainder of the file herein.

In this adversary action, Layson's asserts that John A. Sterbick and the Law Offices of John A. Sterbick ("Sterbick") committed malpractice in the handling of its bankruptcy case. The bankruptcy court summarily dismissed the adversary complaint based on the doctrine of res judicata because of its holdings when it awarded attorney's fees and costs to Sterbick under the

1 bankruptcy code. It also noted that collateral estoppel may apply. Layson's now appeals the
2 dismissal of the complaint. For the reasons stated below, the decision to dismiss the adversary
3 complaint should be affirmed.

4 **I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY**

5 The underlying bankruptcy case is *In re Layson's Restorations, Inc.*, U.S. Bankruptcy
6 Court for the Western District of Washington, case number 11-43910 PBS.

7 **A. GENERAL FACTUAL BACKGROUND FROM ADVERSARY COMPLAINT**

8 The following background is taken from Layson's complaint in the adversary action
9 (filed in this appeal at Dkt. 9-4) and is recited here as context for the findings and rulings below.

10 According to Layson's complaint in the adversary action, on May 6, 2011, Raffi
11 Minasian obtained a judgment of \$412,140.10 against David Layson and his wife in their
12 personal capacities. Dkt. 9-4, at 5-6. Layson's asserts that the judgment was not against it, and
13 the statute of limitations to add it to Minasian's case was due to run in a matter of weeks. *Id.*, at
14 6.

15 On the advice of attorney Sterbick, on May 13, 2011, Layson's filed a Petition for
16 Voluntary Bankruptcy under Chapter 11. *Id.*, at 6. The petition was prepared by Sterbick. *Id.*
17 Sterbick charged Layson's a pre-petition retainer of \$7,000 and collected another \$13,000 for
18 later charges, for a total of \$20,000. *Id.*, at 7. Layson's contends that by filing the petition
19 immediately, it had the effect of staying the statute of limitations of any claims by Minasian
20 against Layson's. *Id.*, at 6.

21 The adversary complaint alleges that after the petition was filed, Layson's primary
22 creditor, Washington Federal Bank, informed Sterbick that it would not voluntarily grant
23 permission for Layson's to use the cash collateral to operate the business. *Id.* Sterbick did not
24

1 seek court permission to use the cash collateral, a motion Layson's asserts is a common motion
2 in Chapter 11 cases. *Id.* According to Layson's, the failure to file this motion resulted in
3 Layson's having to enter into an unfavorable settlement with the bank. *Id.*

4 Under 11 U.S.C. § 1121(e)(1), Layson's had the exclusive right to file a Chapter 11 plan
5 within a certain time period. *Id.*, at 7. Layson's asserts that Sterbick failed to file the plan within
6 the proper time period or seek an extension of time - leaving Layson's vulnerable to a creditor
7 stepping in with its own plan or, as occurred here, having the U.S. Trustee file a motion to
8 dismiss or convert to a Chapter 7. *Id.* Layson's asserts that it incurred additional costs and fees
9 fighting the U.S. Trustee's motions. *Id.*

10 Layson's maintains that during the course of his representation of it in the Chapter 11,
11 Sterbick submitted at least 8 orders to the bankruptcy court that were rejected as either improper
12 or untimely. *Id.* Layson's alleges that when Sterbick finally did prepare a Chapter 11 plan, it
13 required Layson's to pay all debts in full, something the bankruptcy court likely would not have
14 required. *Id.*

15 **B. STERBICK'S APPLICATION FOR FEES AND THE DISPUTES**

16 The remaining facts are taken from both the adversarial complaint and the record in this
17 appeal.

18 Sterbick filed his first application for court approved attorney's fees on December 15,
19 2011, for \$10,039.72. Dkt. 8-7, at 21. No objections were made to the request and it was
20 approved by the bankruptcy court. Dkt. 8-7, at 30-31. Sterbick was paid out of the money
21 Layson's gave him at the start of the case, which according to Sterbick, after this payment left
22 \$1,881.28 in his trust account.

1 On August 1, 2012, Sterbick filed his second application for \$34,082.27 in attorney's fees
2 and 369.90 in expenses. Dkt. 8-7, at 38-42. (Layson's adversarial complaint contends that
3 Sterbick filed this second application without informing it and while David Layson was out of
4 town. Dkt. 9-4, at 7.) The Bankruptcy Court was not informed of any objections to the request,
5 and the request for a total of \$34,452.17 was approved on September 4, 2012. Dkt. 8-7, at 44. A
6 little over a week later, Sterbick paid himself \$1,881.28, which came from his trust account.
7 Dkt. 8-8, at 30.

8 A dispute over the fees ensued. Dkt. 8-8, at 31. Layson's alleges in its adversary
9 complaint that without notification to Layson's, Sterbick then froze \$32,563.89 from its bank
10 account using an "attorney lien." Dkt. 9-4, at 8. Sterbick was still the attorney of record for
11 Layson's. This hold was eventually released. Dkt. 8-7, at 182.

12 On October 3, 2012, Sterbick moved to withdraw from the case, citing disputes with
13 Layson's over the unpaid fees and costs. Dkt. 8-7, at 54-58. Sterbick was aware that Layson's
14 could not continue in the bankruptcy unrepresented by counsel. Dkt. 8-8, at 31.

15 Layson's hired independent counsel, David Smith, to contest this second fee application
16 in late September/early October 2012. See Dkt. 8-7, at 71-74 and 83.

17 On October 26, 2012, the bankruptcy court approved a stipulation by the parties for
18 \$14,000 to be distributed from Layson's bankruptcy estate for a partial payment of the second
19 fee application. Dkt. 8-7, at 128-129. Sterbick was permitted to withdraw from the case on
20 November 1, 2012. *Id.* A hearing was reset for November 15, 2012 regarding the remaining
21 amounts Sterbick contended were due based on the bankruptcy court's September 4, 2012 order
22 on the second application for fees and costs. *Id.*

1 On November 8, 2012, Layson's, through attorney David Smith, filed a Supplemental
2 Memorandum Regarding Investigation of Sterbick Accounting on Request for Disbursement.
3 Dkt. 8-7, at 131-138. In this memorandum, Layson's argued that the remainder of Sterbick's
4 second fee request should not be distributed because the fees were not charged in accordance
5 with the fee agreement between Sterbick and Layson's. *Id.* Layson's pointed out that higher
6 rates were charged than were listed in the fee agreement. *Id.* Layson's asserted that the \$7,000
7 payment which Sterbick received upon filing the petition should be disgorged. *Id.* Layson's
8 argued that under 11 U.S.C. § 328, the bankruptcy court may only allow payment of reasonable
9 compensation "for actual, necessary services." *Id.* (quoting 11 U.S.C. § 328). Layson's also
10 noted that under 11 U.S.C. § 329(b), the bankruptcy court may cancel a fee agreement or order
11 the return of excessive fees paid if the payments exceeded the reasonable value for the attorney's
12 services. *Id.* Layson's argued that the \$7,000 nonrefundable retainer fee Sterbick collected at
13 the time he was hired was not permitted because it was unreasonable and was not for fees that
14 were actually incurred. *Id.* Layson's also maintained that it had been double billed. *Id.*

15 Sterbick filed a response, and agreed to forgo the \$7,000 retainer fee and reduced the
16 requested amount by \$1,234.40 to reflect the billing rates in the fee agreement. Dkt. 8-7, at 140-
17 146. He then sought a remaining balance of \$10,336.49. *Id.*

18 On November 29, 2012, attorney Brett Wittner filed a notice of appearance for Layson's.
19 Dkt. 8-7, at 169.

20 On November 30, 2012, the bankruptcy court approved Sterbick's modified second
21 request for fees, and ordered that \$10,336.49 be distributed out of the estate. Dkt. 8-7, at 148.

22 Sterbick filed a third and final fee application for \$9,446.65 on December 6, 2012. Dkt.
23 8-7, at 153.

1 After receiving a Writ of Garnishment, Key Bank sent Sterbick \$10,336.49 from
2 Layson's bank account on December 7, 2012. Dkt. 8-7, at 151. Layson's asserted that it was not
3 given notice of the garnishment. Dkt. 9-4, at 8.

4 Layson's, through attorney Wittner, filed an objection to the application for the final
5 request for attorney's fees on December 10, 2012. Dkt. 8-7, at 169-170. Layson's argued that
6 the amount of fees requested was unreasonable; that the work performed was done to correct
7 prior errors and mistakes made by Sterbick and his office. *Id.* Layson's also argued that the fees
8 charged were excessive. *Id.* Layson's maintained that Sterbick did not notify it of the December
9 6, 2012 garnishment from the Key Bank account, and asserted that this garnishment was
10 improper. *Id.*

11 On December 11, 2012, Sterbick filed a Writ of Garnishment for \$10,884.04 (based on
12 the bankruptcy court's November 30, 2012 order) to be collected from Layson's bank account at
13 Boeing Employees Credit Union; an additional Writ of Garnishment for Key Bank was filed as
14 well. Dkt. 8-7, at 158-160. Both the accounts were frozen. Dkt. 8-8, at 32. According to the
15 adversarial complaint, Sterbick was informed by the bankruptcy judge that this attempt at double
16 recovery was not permitted by the bankruptcy code. Dkt. 9-4. The funds were eventually
17 released back to Layson's. Dkt. 8-8, at 33.

18 On January 18, 2013, Layson's filed a Supplemental Objection to Application for Final
19 Attorney's Fees. Dkt. 8-7, at 181-194. In this Objection, Layson's argued that Sterbick failed to
20 provide competent legal advice in this bankruptcy case. *Id.* It argued that Sterbick "improperly
21 advised" Layson's to file the Chapter 11 petition because the Minasian judgment was not against
22 Layson's, but against Mr. and Mrs. Layson personally. *Id.*, at 183. Accordingly, Layson's
23 maintained, there was no reason to file the petition at all. *Id.* Layson's asserted that "due to the
24

1 | inexperience of Sterbick in Chapter 11 cases, numerous mistakes were made that resulted in the
2 | excessive fees charged . . . and caused numerous damages, including attorney's fees to correct
3 | the mistakes." *Id.* As example of a mistake Sterbick made, Layson's argued that Sterbick failed
4 | to properly advise the principals of Layson's regarding an "officer's note," which was required
5 | as a part of the bankruptcy. *Id.* Further, it pointed out that despite receiving \$44,336.49 in fees
6 | for a relatively simple Chapter 11 bankruptcy involving two major creditors, the matter was still
7 | not resolved. *Id.* Layson's maintained that Sterbick failed to give it notice of his fees
8 | applications. *Id.* It argued that the "blatant and repeated garnishment of bank accounts has
9 | severely impacted [Layson's] ability to conduct business," were improper, and resulted in
10 | significant unnecessary fees and loss of business. *Id.* Layson's argued that the \$10,336.49 that
11 | was garnished from the Key Bank account should be disgorged and the final application for
12 | attorney's fees should be denied. *Id.*, at 184.

13 | The bankruptcy court held a hearing on the final application for fees on February 14,
14 | 2013. Dkt. 8-8, at 5. The court noted that it had never seen a bankruptcy lawyer garnish his own
15 | client's accounts. *Id.*, at 9-11. The court noted that it put the lawyers at risk of violating the
16 | automatic bankruptcy stay and put their clients at risk. *Id.* A date was set for an oral opinion on
17 | the final application for fees. *Id.*

18 | On February 21, 2013, the bankruptcy court awarded \$2,008.10 in final attorney's fees
19 | and costs to Sterbick. Dkt. 8-7, at 209. In its oral opinion, the bankruptcy court noted that under
20 | 11 U.S.C. § 330, an applicant is entitled to reasonable compensation for actual, necessary
21 | services and that it is the fee applicant's burden to show the fees are reasonable. Dkt. 8-8, at 33.
22 | The bankruptcy court related that in the Ninth Circuit, an examination of whether the burden of
23 | the probable costs of legal services were disproportionately large in relation to the size of the
24 |

1 estate should be considered, as well as to what extent the estate will suffer if the services were
2 not rendered, and to what extent will the estate benefit if they are rendered. Dkt. 8-8, at 33-34.

3 The bankruptcy court stated that:

4 The debtor alleges that the pending requests for attorney's fees are
5 unreasonable. To date the debtor has paid Sterbick \$44,336.49 in legal fees for
6 what this court believes is a rather pedestrian Chapter 11 bankruptcy case.

7 Additionally the debtor believes that Sterbick improperly advised it to file
8 the case because the judgment against David Layson, dba Layson's Restorations,
9 as it was later determined by this court, that the debtor was not a party to the
10 judgment.

11 The Court has insufficient evidence before it to determine whether a
12 Chapter 11 was necessary. There were a number of billing and collection errors,
13 however, that resulted in additional feels [sic] and costs to the debtor as well as
14 errors in judgment by Sterbick.

15 Dkt. 8-8, at 34. The court noted that even though he corrected the errors later, Sterbick's attempt
16 to bill the \$7,000 nonrefundable retainer was contrary to the bankruptcy code as was his change
17 in the hourly rates charged without notice to the client. Dkt. 8-8, at 35. The oral opinion further
18 provided:

19 The Court does take issue with the filing of an attorney fee lien on a
20 current client for fees and finds it to be an error issuing garnishments once an
21 attorney has withdrawn with little or no notice or lift of stay from the pending
22 bankruptcy. Such acts, more importantly, damage the nature of the attorney-client
23 relationship by making counsel an adversary during the pendency of the
24 bankruptcy and having inside information on the client in an attempt to collect its
25 fees after the attorney has withdrawn.

26 Further additional fees and costs were incurred relate to the garnishment
27 and for bounced checks caused by the garnishments. The debtor was required to
28 remove funds from its bank account due to the garnishments and administrative
29 freeze related to the collection actions of Attorney Sterbick.

30 As a result, the debtor asserts it was unable to complete a major order until
31 late March and they incurred canceled orders and lost sales for the first quarter of
32 2013.

33 Lastly, at the commencement of the case, Mr. Layson, the owner of the
34 debtor, held a substantial note receivable owed by the debtor. Sterbick should
35 have made it clear at the beginning of the case that there was a conflict of interest
36 between the principal and the debtor and he would need to have his own counsel.

37 Dkt. 8-8, at 35-36. The opinion concluded:

1 Additional future attorney fees are now certain to be incurred in an attempt
2 to resolve the lingering major issues in the case concerning litigation of a
3 substantial third-party claim as well as to amend and confirm a Chapter 11 plan,
4 as new counsel will need to be brought up to date.

5 The Court has the duty to review the entire case in deciding a final
6 application for attorney's fees and costs. It is also considered, however, that
7 Sterbick corrected most of the problems and has not requested additional fees for
8 several months of work in his attempt to get paid.

9 The Court cannot ignore, however, that Sterbick also wrongly attempted
10 collection efforts while the debtor was under the protection of the bankruptcy
11 court in total disregard of the success of the debtor for the sole purpose of making
12 sure he was paid.

13 The Court must also consider the many billing errors that were made.
14 These are relevant even though they occurred in prior applications. For example,
15 say, for 11 U.S.C. Section 330(a)(5).

16 Also important is that almost \$45,000 in fees and costs and over a year
17 and a half from filing, the debtor has still to deal with the two largest issues of the
18 case: The Chapter 11 plan that now needs to be substantially amended to be
19 confirmed and a hearing over the claim that allegedly placed the debtor into
20 bankruptcy that needed to be resolved by an evidentiary hearing.

21 The cost of the delay and mistakes by the former counsel are difficult to
22 quantify, but taking the pleadings and evidence presented into consideration, this
23 court concludes that Sterbick is entitled to additional fees of \$2,000 and costs of
24 810 - excuse me - costs of 8.10. No other fees and costs will be awarded to
Sterbick in this case.

Dkt. 8-8, at 36-37.

Layson's did not file a notice of appeal of the bankruptcy court's rulings on Sterbick's
applications for attorney's fees and costs.

The bankruptcy court confirmed Layson's Plan of Reorganization on March 6, 2014, a
plan prepared by different counsel. Dkt. 8-5, at 2-22. The Order for Final Decree Closing Case
was entered on September 2, 2014. *Id.*, at 23-24.

C. PROCEDURAL HISTORY OF ADVERSARY ACTION

On December 5, 2014, Layson's and David Layson, individually, filed suit against
Sterbick (and his law office) in Pierce County, Washington Superior Court, case number 14-2-
14827-1, in connection with his representation of Layson's in the bankruptcy proceedings. Dkt.

1 8-5, at 26- 36. Layson's and Layson asserted claims against Sterbick for legal malpractice,
2 breach of fiduciary duty, and for violations of Washington's Consumer Protection Act ("CPA").
3 *Id.* Realizing that the case should be in the bankruptcy court, Layson's and Layson voluntarily
4 dismissed the case. *Id.*

5 On October 7, 2015, the bankruptcy court granted Layson's motion to reopen the
6 bankruptcy. Dkt. 9-2, at 2. Layson's filed the instant adversary complaint on October 7, 2015.
7 Dkt. 9-4. It is the dismissal of this adversary complaint that is the subject of this appeal. Dkt. 1.
8 As in state court, Layson's again asserted claims against Sterbick for legal malpractice, breach of
9 fiduciary duty, and for violations of the CPA in the adversarial complaint. Dkt. 9-4.

10 On January 7, 2016, the bankruptcy court granted Sterbick's motion for summary
11 dismissal of the complaint based on res judicata. Dkts. 6-1 and 8-2. The court's decision was
12 given orally and a short order followed. *Id.* In the oral ruling, the bankruptcy court noted that
13 both parties conceded that the last two elements of res judicata were satisfied: that the decisions
14 were made by a court of competent jurisdiction and that the parties in both actions were in
15 privity. Dkt. 6-1, at 46-47. The court found that the first element was met because it found an
16 identity in the two causes of action. *Id.* It held:

17 The purpose of the fee application hearings was for this court to determine
18 what fees and expenses should be allowed. In making this determination, the
19 court was governed 11 U.S.C. Section 330, and allowed fees based on a
consideration of the nature, extent and value of such services. That's in
accordance with 11 U.S.C. Section 330(a)(3).

20 The claims in the present adversary proceeding are based on the same
21 services evaluated by the court as in the fee application hearings. Res judicata
22 bars any claims that could or should have been asserted in the earlier proceeding .
23 . . [Layson's] was aware of the defendants' alleged malfeasance at the time of the
24 fee hearings because his errors were specifically raised as a basis for disallowing
fees, including the recommendation to file bankruptcy, failure to file a cash
collateral motion, improper garnishment, et cetera.

1 These are the same claims that form the basis for the current adversary
 2 proceeding. . . In addition, [Layson's] was also represented by bankruptcy
 3 counsel. . . The fact that [Layson's] raised this objection and this court reduced
 4 fees as a result creates a stronger basis for applying res judicata.

5 Dkt. 6-1, at 49-51. The bankruptcy court held that a final fee award is a final decision and is
 6 appealable, especially where, as here, "the attorneys for the debtors have been discharged from
 7 further representation" and so the second element of res judicata was met. Dkt. 6-1, at 47 (*citing*
 8 *In re Iannochino*, 242 F.3d 36 (1st Cir. 2001) and *In re Yerkamov*, 718 F.2d 1465 (9th Cir.
 9 1983)). Further, the court noted that not only had Sterbick's representation ceased on November
 10 1, 2012, Layson's plan of reorganization was confirmed on March 6, 2014, and case was closed
 11 on September 17, 2014, and so there was a final judgment on the merits. Dkt. 6-1, at 47-48.
 12 The bankruptcy court concluded that the adversary complaint was barred by res judicata. Dkt. 6-
 13 1, at 49-51. The Court also noted that the claims in the adversary complaint **may** be barred by
 14 collateral estoppel because the issues are identical, final judgment was rendered, the parties are
 15 the same and application of the doctrine does not work an injustice. Dkt. 6-1, at 52 (*emphasis*
 16 *added*). This appeal followed. Dkt. 1.

17 **D. ISSUES RAISED ON APPEAL**

18 Layson's raises three issues on appeal:

- 19 (1) Whether the Bankruptcy Court erred as a matter of law by finding that all the claims
 20 for legal malpractice brought by Layson's against their former bankruptcy counsel,
 21 Sterbick, were barred under the doctrine of res judicata?
- 22 (2) Whether the Bankruptcy Court erred as a matter of law by finding that all the claims
 23 for legal malpractice brought by Layson's against Sterbick were barred under the
 24 doctrine of collateral estoppel?
- 25 (3) Whether the Bankruptcy Court erred as a matter of law by finding that Layson's
 claim against Respondents for violation of the Consumer Protection Act were barred
 under the doctrines of *res judicata* and collateral estoppel?

E. ORGANIZATION OF OPINION

This opinion will address the issues raised on appeal by first examining whether the claims in the adversary complaint are barred by res judicata, then collateral estoppel and lastly, address other issues regarding the dismissal of the CPA claim.

II. DISCUSSION

A. STANDARD OF REVIEW

This Court reviews the bankruptcy court’s legal findings de novo. *Blausey v. U.S. Trustee*, F.3d 1124, 1132 (9th Cir. 2009). Factual findings are reviewed for clear error, remaining undisturbed “unless these findings leave the definite and firm conviction that a mistake has been committed by the bankruptcy judge.” *In re Banks*, 263 F.3d 862, 869 (9th Cir. 2001).

B. RES JUDICATA

Res judicata “precludes lawsuits on any claims that were raised or could have been raised in a prior action.” *Stewart v. Bancorp*, 297 F.3d 953, 956 (9th Cir. 2002). Res judicata applies where there is: 1) an identity of claims, 2) a final judgment on the merits, 3) by a court of competent jurisdiction, and 4) privity between the parties. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 322 F.3d 1064, 1077 (9th Cir. 2003); *Rein v. Providian Financial Corporation*, 270 F.3d 895, 899 (9th 2001).

It is undisputed that the bankruptcy court was a court of competent jurisdiction and that the parties are in privity. Dkts. 8 and 9. The two elements at issue are whether there is an identity of claims and a final judgment on the merits.

1. Identity of Claims

Determining whether there is an identity of claims requires consideration of four criteria, which are not applied “mechanistically:”

(1) whether the two suits arise out of the same transactional nucleus of facts; (2) whether rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (3) whether the two suits involve infringement of the same right; and (4) whether substantially the same evidence is presented in the two actions.

Mpoyo v Litton Electro-Optical Sys., 430 F.3d 985, 987 (9th Cir. 2005).

Consideration of these factors counsels that there is an identity of claims in this adversarial case and those raised in the underlying bankruptcy during the attorney's fees proceedings. The first element, the common nucleus criterion, is often outcome determinative of whether there is an identity of claims. *Mpoyo*, at 987. "Whether two events are part of the same transaction or series depends on whether they are related to the same set of facts and whether they could conveniently be tried together." *Western Sys., Inc. v. Ulloa*, 958 F.2d 864, 871 (9th Cir.1992) (citing Restatement (Second) Judgments § 24(2) (1982)).

The facts Layson's now uses to make its claims for malpractice, breach of fiduciary duty and for violations of the CPA are related to, or are the same, set of facts it relied on opposing the fee applications. In Layson's opposition to the second and final fee requests, it argued that: (1) fees charged were not in accord with the fee agreement because higher hourly rates were used, (2) there were instances of double billing, (3) the \$7,000 nonrefundable retainer was collected contrary to the bankruptcy code because no services were rendered for it and it should be disgorged (Dkt. 8-7 at 131-138), (4) requested fees were unreasonable and excessive considering the work performed, (5) fees were charged to correct counsel's own errors, (6) Sterbick improperly failed to notify Layson's of the garnishments (Dkt. 8-7, at 169-170), (6) Sterbick failed to provide competent legal advice in the filing of the Chapter 11 petition because the Minasian judgment was not against Layson's, in failing to advise the principals of Layson's regarding an "officer's note," and in not promptly having proposed a plan that would resolve this

1 relatively simple case despite receiving over \$44,336.49 in fees, and (7) Sterbick improperly
 2 garnished Layson's (even when Layson's was his client) (Dkt. 8-7, at 181-194). Layson's
 3 argued that as a result of Sterbick's conduct, it was damaged by being charged excessive fees,
 4 needing to pay more attorney's fees to resolve the case, disruption of/lost business as a result of
 5 having its bank accounts improperly frozen, and significant and unnecessary fees. *Id.* Layson's
 6 adversarial complaint now alleges that it was damaged by (1) Sterbick's advice to file the
 7 Chapter 11 petition because the Minasian judgment was not against Layson's, (2) Sterbick's
 8 failure to timely file a plan (or a motion for an extension of time), and when he did file a
 9 proposed plan, it was inadequate, (3) Sterbick's failure to file a motion to use cash collateral
 10 resulting in a more favorable settlement than was necessary with Washington Federal Bank, and
 11 (4) Sterbick's submittal of at least eight orders to the bankruptcy court that were rejected as
 12 either improper or untimely. Dkt. 9-4. The claims Layson's now makes are based on related (or
 13 the same) set of facts it relied on in opposing the fee applications.

14 Moreover, the bankruptcy court considered Sterbick's conduct, and his competency in
 15 representing Layson's, when it reduced Sterbick's second and final requests for fees. Dkt. 8-8, at
 16 37. The bankruptcy court stated it considered 11 U.S.C. § 330. *Id.* Section 330(a) provides:

17 (1) After notice to the parties in interest . . . the court may award to a . . .
 18 professional person employed under section 327 or 1103--

19 (A) reasonable compensation for actual, necessary services rendered by
 20 the . . . professional person, or attorney and by any paraprofessional
 person employed by any such person; and

(B) reimbursement for actual, necessary expenses.

21 (2) The court may . . . award compensation that is less than the amount of
 22 compensation that is requested.

23 (3) In determining the amount of reasonable compensation to be awarded . . . the
 24 court shall consider the nature, the extent, and the value of such services, taking
 into account all relevant factors, including--

- (A) the time spent on such services;
- (B) the rates charged for such services;
- (C) whether the services were necessary to the administration of, or beneficial at the time at which the service was rendered toward the completion of, a case under this title;
- (D) whether the services were performed within a reasonable amount of time commensurate with the complexity, importance, and nature of the problem, issue, or task addressed;
- (E) with respect to a professional person, whether the person is board certified or otherwise has demonstrated skill and experience in the bankruptcy field; and
- (F) whether the compensation is reasonable based on the customary compensation charged by comparably skilled practitioners in cases other than cases under this title.

(4)(A) Except as provided in subparagraph (B), the court shall not allow compensation for—

- (i) unnecessary duplication of services; or
- (ii) services that were not--
 - (I) reasonably likely to benefit the debtor's estate; or
 - (II) necessary to the administration of the case.

11 U.S.C.A. § 330 (West). “The debtor's attorney is included among the professionals compensated under section 330 on the theory that his services, while not performed for the direct benefit of the estate, may be helpful to the bankruptcy process because they facilitate orderly administration of the estate.” *In re Yermakov*, 718 F.2d 1465, 1470 (9th Cir. 1983).

Accordingly, the bankruptcy court considered whether Sterbick’s requests for compensation was for service that was “actual” and “necessary,” beneficial to the estate, and “performed within a reasonable amount of time” in its award of fees. *Id.* The court did not award fees for services that were unnecessarily duplicative, not likely to benefit the estate, or were not necessary to the administration of the case. *Id.* The court, then, necessarily considered the adequacy of Sterbick’s representation of Layson’s in the determination of which, if any, of the fees should be

1 awarded. The bankruptcy court made its fee award based, in part, on the same facts offered in
2 support of the claims in this adversary proceeding.

3 Further, Layson's claims regarding the adequacy of Sterbick's representation, in both the
4 malpractice, breach of fiduciary duty, and violation of the CPA context and the fee application
5 context, could have been "conveniently be tried together." *Western Sys., Inc.*, at 871. In its
6 opposition to the fee applications, Layson's raised several examples of Sterbick's failure to
7 properly represent it. Layson's was aware that the attorney client relationship was broken by late
8 September/early October 2012 when it hired new counsel to represent it. Sterbick points out that
9 under the Bankruptcy Rules, Layson's could have pursued the malpractice claims in response to
10 the fee applications by moving the bankruptcy court to apply the rules of adversary procedure.
11 Dkt. 9; (*citing In Re Paige*, 610 F.3d 865, 874 (5th Cir. 2010)(where party objects to a fee
12 request in a bankruptcy proceeding and includes a malpractice claim, the fee application would
13 become an adversary proceeding under part VII of the Bankruptcy Rules as required by Fed. R.
14 Bank. P. 3007)). Not only was Layson's aware of the facts supporting its malpractice/breach of
15 fiduciary duty claims at the time of the contested fee hearings, Layson's was represented by
16 counsel, and there was a process by which the claims now being asserted could have been raised.
17 The claims asserted in the adversary action and in response to the fee applications "arise out of
18 the same transactional nucleus of facts."

19 The other factors also weigh in favor of finding an identity of claims. The rights of
20 Sterbick in receiving fees would be destroyed or impaired by prosecution of the adversary action,
21 the two suits involve the value of the services rendered, and substantially the same evidence
22 would be presented in both actions. There is an identity of claims here.

1 2. Final Judgment on the Merits

2 There was a final judgment on the merits. The bankruptcy court permitted Sterbick to
 3 withdraw from the case on November 1, 2012. It issued its decision regarding Sterbick's final
 4 fee request on February 21, 2013. "Thus, the bankruptcy court order conclusively determined
 5 the entire section 330 compensation to be paid [Sterbick]. From this premise it follows that the
 6 court's order, entered in the peculiar context of a bankruptcy proceeding, conclusively
 7 determined a separable dispute in the case, and constitutes a 'final judgment, order, or decree'
 8 appealable under 28 U.S.C. § 1293(b)." *In re Yermakov*, 718 F.2d 1465, 1469 (9th Cir. 1983).
 9 The estate's plan was confirmed on March 6, 2014, and the Order for Final Decree Closing Case
 10 was entered on September 2, 2014. Dkt. 8-5, at 2-24. "Confirmation of a plan of reorganization
 11 constitutes a final judgment in bankruptcy proceedings." *In re Heritage Hotel P'ship I*, 160 B.R.
 12 374, 377 (B.A.P. 9th Cir. 1993), *aff'd*, 59 F.3d 175 (9th Cir. 1995). "Like final judgments,
 13 confirmed plans of reorganization are binding on all parties, and issues that could have been
 14 raised pertaining to such plans are barred by res judicata." *Id.*

15 Layson's argues that a final decision on its malpractice, breach of fiduciary duties and
 16 CPA claims were not made, and so the "finality" element fails. Dkt. 9. Layson's misapprehends
 17 the "finality" element. Res judicata bars litigation of claims that were raised or could have been
 18 raised in the prior litigation. *Stewart*, at 956; *In re Bays*, 413 B.R. 866, 877 (Bankr. E.D. Wash.
 19 2009). The fact that the bankruptcy court did not specifically rule on Layson's claims for
 20 malpractice, breach of fiduciary duty, or CPA claims is not determinative of whether there was a
 21 final decision on the merits for purposes of res judicata.

22 Layson's argues that there are no Ninth Circuit cases which address the res judicata question
 23 raised in this case, and the two cases on which the bankruptcy court relied, *In re: Intelogic Trace*,

1 *Inc.*, 200 F.3d 382 (5th Cir. 2000) and *In re: Iannochino*, 242 F.3d 36, 41 (1st Cir. 2001) are
2 distinguishable and should not govern. Dkt. 8.

3 *In re: Intelogic Trace* was an adversary proceeding brought by the trustee against an
4 accountant and other professional advisors at Ernst & Young, alleging they committed
5 malpractice in the provision of services in an underlying bankruptcy. The court held that res
6 judicata barred the adversary proceeding because of the bankruptcy court's decisions regarding
7 professional fee awards to the accountant and advisors under Section 330. It held,

8 By granting Ernst & Young's fee application, the bankruptcy court implied a
9 finding of quality and value in Ernst & Young's services. Similarly, the Trustee's
10 claims in the present suit arise from Ernst & Young's alleged omissions in
11 rendering the very same services considered by the bankruptcy court in the fee
12 application hearing. The Trustee's malpractice claims, challenging the sufficiency
13 and value of Ernst & Young's services, inevitably involve the nature of the
14 services performed for the debtor's estate and the fees awarded under
15 superintendence of the bankruptcy court; they cannot stand alone.

16 *In re Intelogic Trace, Inc.*, 200 F.3d 382, 387-88 (5th Cir. 2000)(*internal quotations and*
17 *citations omitted*). *In re: Iannochino* was a malpractice action against a former bankruptcy
18 attorney. The malpractice action was dismissed based on the res judicata effect of the
19 bankruptcy court's attorney's fee awards. While not precisely on point, *Intelogic* and
20 *Iannochino* are sufficiently similar to this case to provide guidance here. The differences
21 Layson's points out, for example, the fact that no allegation of malpractice was raised at the fee
22 application stage in those cases as it was here, strengthens the application of res judicata because
23 the issues were actually raised and the bankruptcy court considered them and reduced the fee
24 award. The bankruptcy court did not err by relying on those cases.

25 3. Conclusion

26 Res judicata bars Layson's adversary complaint. The bankruptcy court's ruling dismissing
27 the adversary complaint due to the application of res judicata should be affirmed.

1 **C. COLLATERAL ESTOPPEL**

2 The bankruptcy court stated in its oral ruling that the claims asserted here **may** also be barred
3 by the doctrine of collateral estoppel. Dkt. 6-1, at 52. By concluding that the claims raised in the
4 adversary complaint are barred by the doctrine of res judicata, the Court need not reach whether
5 the claims are also barred by the doctrine of collateral estoppel.

6 Layson's asserts for the first time on appeal that the doctrine of collateral estoppel bars
7 Sterbick from arguing that he committed no errors at all and is subject to the bankruptcy court's
8 findings in that regard. Dkt. 8. The court need not consider issues raised for the first time on
9 appeal. *Grimmett v. Brown*, 75 F.3d 506, 515 (9th Cir.1996), *cert. denied*, 117 S.Ct. 759 (1997).
10 Furthermore, Sterbick is not arguing that he committed no errors, just that the bankruptcy court
11 considered his representation of Layson's in the bankruptcy during the contested fee proceedings
12 and so this case is barred by res judicata.

13 Layson's also argues that application of either res judicata or collateral estoppel would work
14 injustice on Layson's. Dkt. 8. While the Court can sympathize with Layson's, the facts here do
15 not support its contention that application of these doctrines would work an injustice.

16 **D. CPA CLAIM**

17 Layson's conceded at oral argument before the bankruptcy court that if the doctrines of res
18 judicata or collateral estoppel barred its claims for malpractice or breach of fiduciary duty, its
19 claims for violation of the CPA would also be barred. Dkt. 6-1, at 29. Layson's makes no
20 substantive argument to the contrary in this appeal. Further, Sterbick argues that this Court
21 should affirm the bankruptcy court's summary dismissal of Layson's CPA claim because it did
22 not, and has not, presented evidence to support the fourth element - requiring an impact on the
23 public interest. Dkt. 9, at 32. Layson's does not address this issue. This Court can affirm the
24

1 bankruptcy court's dismissal of the claim on any ground supported by the record. *Atel Financial*
2 *Corp. v. Quaker Coal Co.*, 321 F.3d 924, 926 (9th Cir. 2003). The dismissal of the CPA claim
3 was also proper because Layson's did not point to evidence of the fourth element of its CPA
4 claim.

5 **E. CONCLUSION**

6 Layson's appeal of the Bankruptcy Court's order summarily dismissing the adversary
7 complaint (Dkt. 1) should be **DENIED**. The judgment is **HEREBY AFFIRMED**.

8 **IT IS SO ORDERED.**

9 The Clerk is directed to send uncertified copies of this Order to all counsel of record and
10 to any party appearing *pro se* at said party's last known address.

11 Dated this 25th day of May, 2016.

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14 ROBERT J. BRYAN
15 United States District Judge
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